

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NICE SYSTEMS, INC. and
NICE SYSTEMS, LTD.,

Plaintiffs,

v.

WITNESS SYSTEMS, INC.,

Defendant.

Civil Action No. 06-311-JJF

JURY TRIAL DEMANDED

JOINT STATUS REPORT

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

Melanie K. Sharp (No. 2501)
Mary F. Dugan (No. 4704)
Monté T. Squire (No. 4764)
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, Delaware 19801
(302) 571-6600

Of Counsel

GIBSON, DUNN & CRUTCHER, LLP

Josh A. Krevitt
Richard M. Koehl (*pro hac vice pending*)
Kevin W. Cherry (*pro hac vice pending*)
200 Park Avenue
New York, New York 10166-0193

KAYE SCHOLER LLP

Scott G. Lindvall (*pro hac vice*)
Joseph M. Drayton (*pro hac vice*)
425 Park Avenue
New York, NY 10022

*Attorneys for Plaintiffs NICE Systems, Inc.
and NICE Systems, Ltd.*

Dated: June 16, 2008

FISH & RICHARDSON P.C.

William J. Marsden, Jr. (No. 2247)
Kyle Wagner Compton (No. 4693)
919 N. Market Street, Suite 1100
P.O. Box 1114
Wilmington, DE 19899-1114
(302) 778-8447

Nagendra Setty (*pro hac vice*)
Daniel A. Kent (*pro hac vice*)
Christopher O. Green (*pro hac vice*)
Noah C. Graubart (*pro hac vice*)
1180 Peachtree Street, N.E.
21st Floor
Atlanta, GA 30309

*Attorneys for Defendant
Witness Systems, Inc.*

BY AN ORAL ORDER entered on February 25, 2008, the Court requested that the parties submit a joint status report on the status of the litigations currently pending between the two parties.

I. THE CURRENT STATUS

A. THIS ACTION

This case was filed on May 10, 2006, and went to trial on January 14-22, 2008. The jury was unable to reach a verdict for either party, and the Court declared a mistrial. [D.I. 344] On January 31, 2008, Plaintiffs, NICE Systems, Inc. and NICE Systems Ltd. (collectively, "NICE"), requested a new trial at the Court's earliest convenience. [D.I. 346] On February 5, 2008, Defendant Witness Systems, Inc. ("Witness Systems") informed the Court:

[T]here are three other District Court cases pending between these parties in Georgia. Two of the cases have been scheduled for trial in the next several months; one beginning March 17th and the other May 12th, 2008. In the third case, fact and expert discovery have been complete for several months and the parties expect to receive a trial date as soon as the fully-briefed motions for summary judgment are resolved. Given that the parties will be fully occupied in back-to-back trials in Georgia for at least the next four months and possibly longer, Witness Systems respectfully submits that setting a date for a new trial in this case is premature.

[D. I. 348]

NICE responded to Witness Systems' request in a letter dated February 12, 2008, and respectfully requested a trial in June or July after the two scheduled trials were complete. [D.I. 349] Specifically, NICE stated that:

NICE filed suit against Witness Systems in the District of Delaware, in part, due to its ability to efficiently resolve cases by scheduling prompt trial dates. Witness Systems, on [the] other hand, selected the Northern District of Georgia as its forum of choice for the three litigations currently pending in that jurisdiction. The resolution of the case before Your Honor should not be unnecessarily and indefinitely delayed until a trial date is set in a case which has been pending in the Northern District of Georgia since August 30, 2004, two years before suit was filed in Delaware.

NICE reiterates its request for a re-trial at the earliest date available on Your Honor's calendar. Because the parties have recently tried these issues, there is no dispute that the case is in fact ready for trial and a prompt trial date would allow the retrial to proceed more efficiently and cost effectively while preparation and memories are relatively fresh.

[D.I. 349]

This Court, by oral order, "decided to schedule trial after the Georgia trials" and asked that Counsel for both parties to submit a Status Report on June 16, 2008.

B. THE GEORGIA ACTIONS

Of the three actions that were pending in the in the Northern District of Georgia as of February, two have gone to trial. With respect to the third action (pending since August 2004) fact and expert discovery is complete, summary judgment motions have been filed, but no trial date has been set.

1. STS SOFTWARE SYSTEMS, LTD. ET AL. V. WITNESS SYSTEMS, INC. CIVIL ACTION NO. 1:04-CV-2111 (N.D. GA.) JUDGE RICHARD W. STORY

A bench trial in *STS Software System Ltd. et al. v. Witness Systems, Inc.* (filed in July 2004) was held before Judge Richard W. Story in Atlanta on March 17-21, 2008. Judge Story issued Findings of Fact and Conclusions of Law on May 23, 2008, in which he held that the asserted claims of U.S. Patent No. 6,871,229 ("the '229 patent") were valid, but not infringed by Witness Systems' accused products. Witness Systems has filed post-trial motions pursuant to Fed. R. Civ. P. 52(b) seeking to modify certain findings of fact and conclusions of law. NICE plans to appeal Judge Story's decision to the U.S. Court of Appeals for the Federal Circuit.

**2. VERINT AMERICAS INC. (F/K/A WITNESS SYSTEMS, INC.) V. NICE SYSTEMS LTD. AND NICE SYSTEMS, INC.
CIVIL ACTION NO. 1:06-CV-126 (N.D. GA.)
JUDGE TIMOTHY S. BATTEN, SR.**

A jury trial in *Verint Americas Inc. v. NICE Systems, Ltd. et al.* (filed in January 2006) was held before Judge Timothy S. Batten, Sr. on May 12-16, 2008. The jury reached a verdict finding NICE infringed the patent-in-suit that the patent was not invalid, and awarded damages. NICE moved for Judgment as a Matter of Law under Rule 50(b) and in the alternative for a new trial under Rule 59. Verint Americas, Inc. has moved for a permanent injunction. Briefing on those motions is not yet complete.

**3. WITNESS SYSTEMS, INC. V. NICE SYSTEMS, INC. AND NICE SYSTEMS, LTD.
CIVIL ACTION NO. 1:04-CV-2531 (N.D. GA.)
JUDGE CHARLES A. PANNELL, JR.**

The *Witness Systems, Inc. v. NICE Systems, Inc. et al.* (filed in August 2004) case is currently pending in the Northern District of Georgia before Judge Pannell. NICE has moved for summary judgment of invalidity of the patents-in-suit and to limit damages. Those motions are fully briefed and are pending before Judge Pannell. No trial date has been set, although fact and expert discovery are closed.

II. THE PARTIES' POSITIONS REGARDING A NEW TRIAL

A. NICE'S POSITION

NICE now renews its request for a retrial in this case to be set at the Court's convenience in the near future. Given that the two scheduled trials in the Northern District of Georgia are complete, NICE respectfully submits that this case should proceed to retrial without delay. In fact, because the parties have recently tried the issues in this case, there is no dispute that the case is in fact ready for trial and a prompt trial date would allow the retrial to proceed more efficiently and cost effectively while preparation and memories are relatively fresh. Therefore,

NICE respectfully requests that the Court set a trial as soon as practicable, preferably after September 1, 2008 (Labor Day), in order to accommodate the witnesses' schedules.

NICE understands that Witness Systems may now suggest that this Court delay setting a trial date in this matter, pending a trial date in the third Georgia case that is before Judge Pannell. NICE respectfully submits that such delay in setting the trial date would be unreasonable and unfair. No trial date has been set in that case, and the court in Georgia has provided no indication, at least to NICE's counsel, of when a trial might be set in that action.¹ Given the preparation and readiness of the parties to move forward with this case, it would not be reasonable to delay this case without limit pending an uncertain trial date in another case.

Finally, NICE also understands that Witness may seek to delay this trial pending reexaminations that have been filed with respect to certain of the patents-in-suit. Notably, the rejections of NICE's patent claims in the reexamination are only non-final rejections, which are quite common in reexaminations and frequently are overcome. These reexaminations, which the parent company of Witness Systems filed, virtually on the eve of the first trial in this case, cannot support a delay of the re-trial in this case.

B. WITNESS SYSTEMS' POSITION

As NICE has already had the opportunity to present its case to a jury in Delaware and failed to carry its burden, Witness Systems requests that the Court refrain from setting a date to

¹ Witness Systems informed NICE for the first time today that "several months ago" it had contacted Judge Parnell's Chambers without involving – or even informing NICE – regarding (at least) certain scheduling matters, and that the Court indicated that a trial date would be set this fall. Witness Systems never revealed this unilateral communication with the Court before today, and the Court has certainly never provided any such indication to NICE. Notwithstanding Witness Systems' previously undisclosed communication with the Court, the fact remains that, no trial date is set in that case and the parties do not know when one will be set.

try this case a second time until after the parties have successfully completed trial of all of the co-pending cases in the Northern District of Georgia, including the case pending before Judge Pannell since August 2004.²

As the Court is aware, NICE initially asserted infringement of ten patents in this case, but ultimately dropped its allegations with respect to five of those patents and only asserted infringement of the five remaining patents at trial. Specifically, NICE asserted infringement of U.S. Patent Nos. 7,010,109 (“the ’109 patent”); 6,870,920 (“the ’920 patent”); 5,396,371 (“the ’371 patent”); 6,775,372 (“the ’372 patent”); and 6,249,570 (“the ’570 patent”).

Prior to trial, Witness Systems’ parent company, Verint Systems, Inc., requested reexamination of the all of the NICE patents asserted at trial. The United States Patent and Trademark Office (“USPTO”) granted reexamination of all of the patents (except with respect to the ’570 patent), noting substantial new questions of patentability. Subsequent to trial, the USPTO rejected all of the claims of the ’109 and ’920 patents that NICE asserted at trial as anticipated by, and obvious in light of, the prior art. The USPTO has not yet issued an initial office action with respect to the ’371 and ’372 patents.

² Witness Systems contacted chambers several months ago to inquire about the status of that case, and learned that the parties could expect a ruling on the pending summary judgment motions by September of this year, after which the case would be set for trial. Fact and expert discovery are closed and briefing on NICE’s summary judgment motions was completed in January 2008.

Respectfully Submitted,

FISH & RICHARDSON P.C.

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

/s/ Kyle Wagner Compton

William J. Marsden, Jr. (No. 2247)
Kyle Wagner Compton (No. 4693)
919 N. Market Street, Suite 1100
P.O. Box 1114
Wilmington, DE 19899-1114
(302) 778-8447
kcompton@fr.com

Nagendra Setty (*pro hac vice*)
Daniel A. Kent (*pro hac vice*)
Christopher O. Green (*pro hac vice*)
Noah C. Graubart (*pro hac vice*)
1180 Peachtree Street, N.E.
21st Floor
Atlanta, GA 30309

*Attorneys for Defendant
Witness Systems, Inc.*

/s/ Monté T. Squire

Melanie K. Sharp (No. 2501)
Mary F. Dugan (No. 4704)
Monté T. Squire (No. 4764)
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801
P.O. Box 391
Wilmington, DE 19899
(302) 571-6600
msquire@ycst.com

Of Counsel
GIBSON, DUNN & CRUTCHER, LLP
Josh A. Krevitt
Richard M. Koehl (*pro hac vice* pending)
Kevin W. Cherry (*pro hac vice* pending)
200 Park Avenue
New York, New York 10166-0193
(212) 351-4000

KAYE SCHOLER LLP
Scott G. Lindvall (*pro hac vice*)
Joseph M. Drayton (*pro hac vice*)
425 Park Avenue
New York, NY 10022
(212) 836-8000

*Attorneys for Plaintiffs NICE Systems, Inc.
and NICE Systems, Ltd.*

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